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QUARTERLY REPORT

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The **Quarterly Report** provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

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THE PLEDGE OF ALLEGIANCE: "ONE NATION, UNDER ADVISEMENT"

The continuing dispute over the inclusion of "under God" in the Pledge of Allegiance finally made its way to the U.S. Supreme Court only to be dismissed on June 14, 2004, for a technical reason.[1] Although a resolution to the dispute was not achieved, the Supreme Court may well have indicated how it will decide the matter when it next reaches the highest court.

In Michael Newdow v. U.S. Congress *et al.*, 328 F.3d 466 (9th Cir. 2003), a much-divided 9th U.S. Circuit Court of Appeals determined the 1954 insertion by Congress of the phrase "under God" into the Pledge of Allegiance violated the First Amendment's Establishment Clause.[2] The 9th Circuit conflicted with an earlier decision by the 7th U.S. Circuit Court of Appeals, which found no such constitutional violation. See Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437 (7th Cir. 1992). The dispute involved Newdow, an atheist, who objected to the local public school district's requirement that the Pledge be recited on a daily basis. His daughter attended elementary school in the district. The conflict received considerable national attention.

The U.S Supreme Court found that Newdow did not have standing to prosecute this action on behalf of his daughter and reversed the 9th Circuit. In Elk Grove Unified School District *et al.* v. Newdow *et al.*, 124 S. Ct. 2301 (2004), the Supreme Court provided a succinct history of the Pledge up to its amendment by Congress on June 14, 1954,[3] to include "under God" as part of the ideological struggle with the Soviet Union and its allies during the so-called "Cold War."[4] The Pledge is presently codified at 4 U.S.C. § 4.

California law requires that "every elementary school" begin each day with "appropriate patriotic exercises." Recitation of the Pledge is one way to satisfy this requirement. Elk Grove Unified School District, where Newdow's daughter attended elementary school, requires that "[e]ach

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[1]Please refer to the Cumulative Index for past **Quarterly Report** articles on this case as well as other disputes involving the Pledge of Allegiance.

[2]The First Amendment reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[3]Act of June 14, 1954, ch. 297, 68 Stat. 249.

[4]Although not much has been made of this, June 14th is "Flag Day" in the United States. It apparently is no coincidence that Congress amended the Pledge on this day in 1954 and the U.S. Supreme Court issued its decision on June 14, 2004, exactly 50 years later.

elementary school class recite the pledge of allegiance to the flag once each day," although students who object to such recitation on religious grounds can abstain from this activity.[5] 124 S. Ct. at 2306.

Newdow filed suit in March of 2000, seeking a declaration that the 1954 addition of the words "under God" violated the Establishment Clause and the Free Exercise Clause of the First Amendment as well as an injunction prohibiting the school district from requiring daily recitation of the Pledge. Early on there were serious questions whether Newdow had standing to prosecute such an action. Although the federal district court found the words "under God" were not constitutionally suspect, the 9th Circuit Court of Appeals struggled. It issued three separate opinions addressing the "standing" issue. In Newdow v. Congress, 292 F.3d 597, 602 (9th Cir. 2002), a three-member panel of the 9th Circuit was unanimous that Newdow had standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." He had the right on his own to challenge the 1954 amendment. One the merits of the dispute, the panel found, 2-1, that the words did violate the First Amendment. 124 S. Ct. at 2307.

Thereafter, the mother of Newdow's daughter, Sandra Banning, sought to intervene or otherwise have Newdow's complaint dismissed. Newdow and the mother were never married, but Banning claimed a State court had granted her "exclusive legal custody" of the child, which granted her the right to make decisions about the child's education and welfare. Banning also represented that the child was a Christian and does not object to reciting the Pledge. A State court did enjoin Newdow from including his daughter as an unnamed party or suing as her "next friend."

The 9th Circuit reconsidered its earlier opinion in light of the State court action, but found that Newdow, even as a non-custodial parent, still had standing to "object to unconstitutional government action affecting his child." Newdow v. Congress, 313 F.3d 500, 502-03 (9th Cir. 2002). Later, the Court of Appeals issued an order amending its first opinion and denying rehearing *en banc*. Newdow v. Congress, 328 F.3d 466 (9th Cir. 2003). Nine (9) judges dissented from the denial of *en banc* review. 124 S. Ct. at 2307-08.

The U.S. Supreme Court granted the school district's petition for a writ of certiorari to address two (2) questions: (1) Does Newdow, as a non-custodial parent, have standing to challenge the school district's policy; and (2) if so, does the policy offend the First Amendment? There are two strands of jurisprudence with respect to standing. The first is Article III standing, which enforces the Constitution's "case or controversy" requirement. Under Article III standing, a plaintiff must show that the conduct of the defendant has caused him to suffer an "injury in fact" that a favorable judgment will redress.

The second strand involves "prudential standing," which involves self-imposed limitations on the exercise of federal jurisdiction. "Prudential standing" encompasses, *inter alia*, a general prohibition

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[5]This exception is based upon the Supreme Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943). For a complete discussion on this case and the history of the Pledge pre-Newdow, see "The Pledge of Allegiance in Public Schools," **Quarterly Report** July-September: 2001 (Dana L. Long, Legal Counsel).

on a litigant's raising another person's legal rights. It also encompasses "generalized grievances" better addressed by the legislative body. 124 S. Ct. at 2308-09. In addition, the Supreme Court has "customarily declined to intervene in the realm of domestic relations. Long ago we observed that the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." Id. at 2309 (citation and internal punctuation omitted). Although there are "rare instances" where it is necessary to address a "substantial federal question" that transcends the family law issue, "in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." Id.

When Banning entered the fray, the complexion of the case was altered. The state court order granted Banning "*sole* legal custody" of the child with the ultimate right to make decisions as to her health, welfare, and education. Although such decisions were to involve consultation with Newdow, where the parents could not mutually agree on a course of action, Banning was authorized to "exercise legal control." Newdow argues that, Banning's authority notwithstanding, he has "an unrestricted right to inculcate in his daughter–free from governmental interference–the atheistic beliefs he finds persuasive." Id. at 2310.

The difficulty with this argument, the court wrote, "is that Newdow's rights, as in many cases touching upon family relations, cannot be viewed in isolation." It isn't just Newdow's rights, "but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically." The child should also be considered as her interests are implicated in this very public dispute. Id.

Newdow's standing, if any, is derived "entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend." His interests and his daughter's interests are not parallel and may, in fact, be in conflict. Id. at 2311. Newdow's interest in inculcating his daughter with his views is not being inhibited by either Banning or the school district. It appears to be the opposite.

> He wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree. [California law] simply [does] not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion.

Id. The Supreme Court then lectured the 9th Circuit for not dismissing this matter when it became clear that Newdow did not have standing.

> In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. There is a vast difference between Newdow's right to communicate with his

> child–which both California law and the First Amendment recognize–and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order.

Id. at 2312. Newdow lacked standing to bring this action. Accordingly, the 9th Circuit was reversed. Id.

The "Heckler's Veto"

Not all the members of the Supreme Court were satisfied to dismiss the matter on a technical matter. Chief Justice William Rehnquist would have decided the matter on its merits and found against Newdow.[6]

> To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under Gods' authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.

Id. at 2317 (Rehnquist, C.J., concurring). He then provided a list of historical instances where the phrase "under God" or similar expressions manifested themselves in public observances. Examples included George Washington's first inauguration on April 30, 1789; Washington's first Thanksgiving proclamation made that same year at the encouragement of Congress (ironically, a day after the First Amendment was proposed), a proclamation replete with religious references and one that has been issued in substantially similar fashion by each president since; Abraham Lincoln in his Gettysburg Address (actually employing the phrase "under God"); Lincoln's second inaugural address (March 4, 1865); Woodrow Wilson's appearance before Congress in April 1917 to request a declaration of war against Germany; Franklin Delano Roosevelt's first inaugural address; General Dwight D. Eisenhower's address to the troops on D-Day; the motto "In God We Trust," which first appeared on American coins during the Civil War; and the famous opening proclamation by the Supreme Court Marshal: "God save the United States and this honorable court," which traces its history to at least 1827. Id. at 2317-19.

"All these events strongly suggest," the Chief Justice wrote, "that our national culture allows public recognition of our Nation's religious history and character." Id. at 2319.

> I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee* [*v. Weisman*, 505 U.S. 577 (1992),

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[6]Justice Sandra Day O'Connor joined in the Chief Justice's opinion concurring in the judgment. Justice Clarence Thomas concurred partially. Justice Antonin Scalia did not participate in this matter because of public comments he made on the dispute before the dispute was properly before the court.

> involving the giving of invocation at a public school graduation ceremony]. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R. Rep. No. 1693, at 2: "From the time of our earliest history, our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Id. at 2319-20. Newdow should not be permitted to exercise a "heckler's veto" over the decision of the public schools to permit willing participants to pledge allegiance to the flag in the manner prescribed by Congress. The mere fact that he disagrees with "under God" within the Pledge, especially where its recitation could not reasonably lead to the establishment of any religion, is unavailing. "There may be others who disagree, not with the phrase 'under God,' but with the phrase 'with liberty and justice for all.' But surely that would not give such objectors the right to veto the holding of such a ceremony by those willing to participate." Id. at 2320.

"Ceremonial Deism" and the "Reasonable Observer"

Although Justice O'Connor concurred in the judgment of the court–and joined in Chief Justice Rehnquist's concurring opinion, she wrote a separate concurring opinion. Her opinion may be the more important one. Although the Court bounced Newdow on the standing issue without addressing the core issue, it is apparent that someone else will attempt to bring the same central issue back to the Supreme Court at some later date. Justice O'Connor's concurring opinion establishes the likely legal foundation upon which a majority opinion would be based, either in upholding the Pledge as currently written or any challenge to the National Motto ("In God We Trust").

Justice O'Connor reiterated her belief that Establishment Clause challenges cannot be reduced to a single test. The "endorsement test" remains one of the more viable ones where government-sponsored speech or displays are at issue. To decide whether endorsement has occurred, a court must keep in mind two crucial principles: First, the viewpoint must be one of a reasonable observer.[7]

Second, because this "reasonable observer" must embody a community ideal of social judgment as well as rational judgment, the reasonable observer must be deemed aware of the history of the conduct in question and must understand its place in our Nation's cultural landscape. This avoids the evaluation of a practice in isolation from its origins and context. Id. at 2321-22 (O'Connor, J., concurring).

[7]Justice O'Connor noted that there is a "dizzying religious heterogeneity" in the United States such that adopting a subjective approach would be absurd. Such an approach could invalidate virtually any government action. Id. at 2321.

Government has been permitted in the past to refer to or commemorate religion in public life without judicial interference. "I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes." Such references are inevitable in the United States. "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes,[8] and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." Id. at 2322.

"Facially religious references" serve valuable purposes in public life by solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. "For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-religion." Id. at 2322-23 (citation omitted).

There are no *de minimis* violations of the Constitution, and she isn't suggesting that there are minor or slight violations the Court can accept. Rather, she believes there is a "discrete category of cases" where government can acknowledge or refer to the divine without offending the Constitution. These she refers to as "ceremonial deism," and would include such matters as the National Motto, religious references in such patriotic songs as The Star-Spangled Banner, and the words from the Marshall that open each of the sessions of the U.S. Supreme Court. "These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye." Instead, it is the history, character, and context that prevent them from being constitutional transgressions at all. Id. at 2323.

Justice O'Connor, relying upon a four-factor analysis, determined that the recitation of the phrase "under God" in the Pledge is an example of "ceremonial deism" and not a constitutional violation.

1. History and Ubiquity

"Ceremonial deism" depends upon a shared understanding of a practice's legitimate nonreligious purpose. "That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous." Id. A novel or uncommon reference could more easily be perceived as government endorsement because the reasonable observer could not be presumed to be fully familiar with the origin. "History and ubiquity," then, are a necessary part of any analysis. Id. In this case, fifty years (to the date, as noted *surpa*) have passed since Congress added "under God" to the Pledge. This is a "not inconsiderable" length of time, given the "relative youth of our Nation."

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[8]Justice O'Connor listed a number of State mottoes that have religious references, many which also appear on the state seal or state flag. The oaths of judicial office, citizenship, and military and civil service all end with the optional "so help me God." A number of patriotic songs also contain religious references. Id. at 2322.

During this time, recitation of the Pledge has become "our most routine ceremonial act of patriotism" alongside the singing of the National Anthem. "As a result, the Pledge and the context in which it is employed are familiar and nearly inseparable in the public mind." Id. "[T]he history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy." Id. at 2324. In addition, the paucity of legal challenges to the Pledge is also telling, especially in light of the public's penchant for engaging in Establishment Clause litigation. "...I find it telling that so little ire has been directed at the Pledge." Id.

2. Absence of Worship or Prayer

Government's approval of a particular kind of prayer or particular form of religious service poses one of the greater dangers to the freedom of the individual to worship in his own way. Only one such situation has ever been upheld by the Supreme Court: Marsh v. Chambers, 463 U.S. 783 (1983), upholding the Nebraska legislature's 200-year-old practice of opening its sessions with a prayer offered by a chaplain. "Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history." Id.

A "reasonable observer" could not conclude that reciting the Pledge would constitute an act of worship. "I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith." The phrase itself is "merely descriptive" as "it purports only to identify the United States as a Nation subject to divine authority." Id. at 2325. In addition, the reasonable observer would note that the original secular character of the Pledge was not transformed by the 1954 amendment. The continued repetition of the reference to "one Nation under God" in an exclusively patriotic context has shaped the cultural significance of the phrase to conform to that context.

3. Absence of Reference to Particular Religion

"[N]o religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another." The Pledge does not refer to "under Jesus" or "under Vishnu"; rather, the Pledge acknowledges religion in a general way: "a simple reference to a generic 'God.'" Even though not all religions espouse a belief in a Supreme Being, the amendment of the Pledge at a time when the Nation was not so diverse represents a "tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system." Id. at 2325-26.

4. Minimal Religious Content

Newdow's challenge focuses on only two of the 31 words in the Pledge. Such a highly circumscribed reference to God "qualifies as a minimal reference to religion." In addition, "the presence of those words is not absolutely essential to the Pledge, as demonstrated by the fact that it existed without them for over 50 years." Id. at 2326.

Brevity of a reference to religion or God can be important in a ceremonial exercise for several reasons: (1) it confirms the reference is being used to acknowledge religion or to solemnize an event rather than to endorse religion in any way; (2) it makes it easier for those who wish to "opt out" of reciting language with which they disagree to do so without having to reject the ceremony in its entirety; and (3) it limits the ability of government to express a preference for one religious sect over another. Id.

Newdow's distaste for "under God," however sincere, "cannot be the yardstick of our Establishment Clause inquiry. Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." Id. at 2327.

Newdow Fires Back

Michael Newdow was understandably disappointed in the Supreme Court's decision. In an Op-Ed column published in *The New York Times* on June 21, 2004, Newdow lamented that the Supreme Court "ruled in effect that once parents are involved in family court proceedings, their federal rights are at risk."

He argued that the court decided the matter on "prudential" standing without addressing whether he had standing under Article III's case-or-controversy standard. He asserted there is a case or controversy because his daughter's daily recitation of the Pledge and its "one Nation, under God" has resulted in injury to him. "Because I am an atheist, she is, in essence, told every school morning that her father's religious views are wrong."

Newdow also objected to the court's deference to the state court's jurisdiction over domestic relations, which he believes interfered with his constitutional rights. "[N]othing I requested was a family law matter." He noted that the legal custody dispute did not arise until he had received a favorable decision from the 9th Circuit Court of Appeals. When he first initiated his challenge to the Pledge in 1998, his daughter's mother did not object. Their custody dispute did not begin till a year later. He questioned why the court could not have decided the matter on its merits. Such a decision "would have no effect on...the family law judge's orders."

The court "strained" the concept of standing when it wrote that "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the law suit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."[9]

If a non-custodial parent's standing can be proscribed in such a fashion, he argued, then "[w]hat's to limit this policy in the future? If a school district reverts to racially segregated classrooms, does a divorced black mother have no standing because the father prefers it? If–in direct violation of

[9]124 S. Ct. 2301, 2312 (2004).

Supreme Court precedent–a public school district starts teaching the biblical account of Creation, is a scientist prohibited from challenging that practice because the other parent is a fundamentalist Christian?" He added, "And what if a mother agrees with her daughter's teacher that it's proper to start off every school day by having the class stand up and say that it's fine to treat atheists (like the girl's father) as second-class citizens?"

Congress, he maintained, breached the Constitution when it took "a position on questions of religious belief." This error was compounded, he stated, when "the state court system broke the rule that says that fit parents have a fundamental constitutional right to love and protect their children (as might be appreciated by the fact that no reasonable justification for my loss of legal custody has ever been presented)." Now, he complained, the federal courts have further compounded these purported errors.

He concluded his essay with: "God bless America."

Symbolic Speech and the Pledge of Allegiance

While attention was focused on Washington, D.C., and the Supreme Court, a different sort of struggle was occurring in Alabama. Fawn Allred, an economics and government teacher at Parrish High School in Walker County, Alabama, noticed that one of her students was not reciting the Pledge of Allegiance when it was recited over the intercom system. It was customary for students to stand by their desks, with their hands over their hearts, and recite the Pledge. John Michael Hutto remained silent with his hands in his pockets. Allred asked him why he was not reciting the Pledge. He replied that he didn't wish to do so and hadn't done so for a month. Allred stated, "You don't want to say the pledge and the United States Air Force Academy has given you a scholarship?"

Allred reported this incident to the principal, who became "very angry" and arranged a meeting with Hutto and the vice principal. The principal threatened Hutto by saying he would report this to both the Air Force Academy and the Congressman who recommended Hutto to the Academy. He ordered Hutto to apologize to Allred and her class.

On the day following this incident, when the Pledge was to be recited, Michael Holloman stood with the rest of his class but did not recite the Pledge. Instead, he "silently raised his fist in the air." He did not say anything, did not disrupt the class, or obstruct anyone's view of the flag. Allred chastised him in front of the class for his actions. She also informed the principal of this incident. The principal arranged a meeting with Holloman and Allred. Holloman explained that he raised his fist in protest of what had happened to Hutto. The principal gave Holloman three days' detention and indicated Holloman would not receive his high school diploma until he completed his punishment. He also ordered Holloman to apologize to Allred and her class. The principal called Holloman's mother and said "that he was too mad and upset to punish Michael at the time because he may hurt Michael."

Graduation was slated for that Friday. There was insufficient time for Holloman to complete the three days' worth of detentions and still receive his diploma. The principal offered Holloman the

opportunity for a paddling in lieu of detentions. Holloman was paddled by the principal while Allred observed.

Holloman Sues

Holloman sued under 42 U.S.C. § 1983, claiming his First Amendment right of Free Speech had been violated. The federal district court granted summary judgment to the school officials based on qualified immunity. The district court also concluded that Holloman's allegations did not raise a First Amendment "free speech" issue nor did he enunciate a right that was "clearly established" at the time of the complained-of incidents.

The 11th Circuit Court of Appeals found otherwise. In Holloman *et al.* v. Harland *et al.*, 370 F.3d 1252 (11th Cir. 2004), the Circuit Court of Appeals acknowledged that when a government official (in this case, the principal and teacher of the public high school) is sued under a direct-liability theory, the official "may seek summary judgment on qualified immunity grounds." To be eligible for summary judgment under this defense, the official "must have been engaged in a 'discretionary function'[10] when he performed the acts of which the plaintiff complains." The burden then shifts to the plaintiff who, in order to overcome such a defense, must show that: (1) the school official violated a constitutional right; and (2) the right was "clearly established" at the time of the purported violation. 370 F.3d at 1263-64. "The primary purpose of the qualified immunity doctrine is to allow a government employee to enjoy a degree of protection only when exercising powers that legitimately form a part of their jobs." Id. at 1266-67.

Holloman argued that the teacher and the principal violated both rights guaranteed by the Free Speech Clause of the First Amendment (freedom to express; freedom from being compelled to express) when he was punished for failing to recite the Pledge of Allegiance and when they punished him for raising his fist in the air in protest. Id. at 1265.

In analyzing whether a school official was engaged in a "discretionary function," the court looks to two areas of inquiry: (1) whether the official was engaged in a legitimate job-related function, (2) "through means that were within his power [or authority] to utilize." Id.

> Employment by a local, county, state, or federal government is not a *carte blanche* invitation to push the envelope and tackle matters far beyond one's job description or achieve one's official goals through unauthorized means. Pursuing a job-related goal through means that fall outside the range of discretion that comes with an employee's job is not protected by qualified immunity.

Id. at 1267. Allred was "undoubtedly engaged in a discretionary function" (maintaining decorum in the classroom) when she chastised Holloman for raising his fist during the Pledge and by referring

[10]A "discretionary function" is the performance of an activity that requires the exercise of independent judgment. Its opposite is the "ministerial task."

the matter to the principal. The principal, likewise, satisfies the first part of the inquiry in that pupil discipline is "a legitimate discretionary function" of any principal. Id.

The second inquiry in this dispute centers on whether the teacher and the principal "violated a constitutional right that was clearly established at the time of the acts in question," an impermissible manner to discharge one's discretionary function if it occurred. Id.

The 11th Circuit noted that the U.S. Supreme Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943) has long "held that the right to be free from compelled speech protects pubic school students from being forced to participate in the flag salute." There is evidence that Allred's activities may have been unconstitutional: (1) Allred previously chastised Hutto and threatened his scholarship for his disinclination to recite the Pledge; and (2) she chastised Holloman for his failure to recite the Pledge and for his raising his fist, even though his conduct did not disrupt the classroom**.** "Verbal censure is a form of punishment, albeit a mild one. The intent behind [Allred's] act was to dissuade him from exercising a constitutional right." Allred singled out Holloman and rebuked him in front of the class**.** "Given the gross disparity in power between a teacher and a student, such comments–particularly in front of the student's peers–coming from an authority figure with tremendous discretionary authority, whose words carry a presumption of legitimacy, cannot help but have a tremendous chilling effect on the exercise of First Amendment rights." Id. at 1268-69. Allred also played a role in Holloman's eventual paddling. She referred the matter to the principal "with the intent and hope that Holloman be disciplined," was present during the principal's interrogation as well as the subsequent administration of corporal punishment, "and manifested her approval of it throughout the entire process." There is similar evidence against the principal, the one who actually paddled Holloman. The record supports Holloman's contention that the teacher and principal violated his constitutional right to be free from compelled speech. What is unresolved is whether such a constitutional right is "clearly established." Id. at 1269.

Although the federal district court found such a right not to be "clearly established," the U.S. Supreme Court's 1943 decision in Barnette "clearly and specifically established that school children have the right to refuse to say the Pledge of Allegiance." Any "reasonable person" should have known that "disciplining Holloman for refusing to recite the pledge impermissibly chills his First Amendment rights." Neither the teacher nor the principal is entitled to qualified immunity against Holloman's claim of compelled speech. Id.

This leaves open the question whether Holloman's symbolic speech (the raising of his fist in protest) was likewise a constitutionally protected activity. The 11th Circuit found that it was, primarily because the "speech" was not disruptive expression within the classroom environment. This right was also "clearly established" so as to defeat the qualified immunity defense.

For "expressive conduct" such as Holloman's "symbolic speech" to come under the First Amendment, there must be (1) an intent to convey a particularized message that (2) would be understood by those who viewed it. "Thus, in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message." Id. at 1270. There is little question here that

Holloman's "speech" satisfies both of these elements. In fact, it may have been more in the realm of "pure speech" than "expressive conduct," but a distinction is not necessary in this case. Further, Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 89 S. Ct. 733 (1969) (the wearing of black armbands by students protesting the Viet Nam War) "clearly established" a student's constitutional right to certain speech. Id.

This is not to say, the court added, that student speech cannot be subject to regulation when necessary to maintain "order and decorum within the educational system." In other words, the expressive conduct, to be regulated, would have "reasonably led school authorities to forecast substantial disruption of or material interference with school activities." Id. at 1271, citing to Tinker. The court will not "simply defer to the specter of disruption or the mere theoretical possibility of discord" in approving regulation of student speech, especially where there is an "insubstantial impact on classroom decorum." Id. In this case, there is no evidence that Holloman's gesture caused any disturbance or unrest. "While certain types of expression unquestionably cause enough of a threat of disruption to warrant suppression even before negative consequences occur, 'undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression,' even in schools." Id. at 1273, quoting Tinker, 393 U.S. at 508, 89 S. Ct. at 737. It does not matter that other students may have disagreed with Holloman, or complained his gesture resulted in their experiencing discomfort or unpleasantness. "...Holloman's expression [is not] removed from the realm of constitutional protection simply because the students cloaked their disagreement in the guise of offense or disgust. Holloman's behavior was not directed 'toward' anyone or any group and could not be construed by a reasonable person (including a high school student) as a personal offense or insult." Id. at 1274-75.

> While the same constitutional standards do not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason. If the people, acting through a legislative assembly, may not proscribe certain speech, neither may they do so acting individually as criminals. Principals have the duty to maintain order in public schools, but they may not do so while turning a blind eye to basic notions of right and wrong.

Id. at 1276. "...Holloman had the constitutional right to raise his fist during the Pledge of Allegiance so long as he did not disrupt the educational process or the class in any real way." Id. Allred's contention Holloman was punished for not following her directions is unavailing. "Allred could not prevent Holloman from exercising a constitutional right simply by telling him not to do so. School officials may not punish indirectly, through the guise of insubordination, what they may not punish directly." Id.

Tinker and its progeny created a "standard [that] was clearly established and sufficiently specific as to give the defendants 'fair warning' that their conduct was constitutionally prohibited. We do not find it unreasonable to expect the defendants–who holds themselves out as educators–to be able to apply such a standard, notwithstanding the lack of a case with material factual similarities." Id. at 1278. "The record, interpreted in the light most favorable to Holloman, more than amply supports

his argument that he was punished for the substance of his unpatriotic views rather than an alleged disruption of class." Id. at 1281.

Allred's "Prayer Requests"

Under the No Child Left Behind Act of 2001 (NCLB), each Local Educational Agency (LEA), in order to receive federal funds under the NCLB, is required to certify in writing to the State Educational Agency (SEA) that the LEA has no policy that prevents or otherwise denies participation in constitutionally protected prayer in the LEA's elementary and secondary schools as detailed in guidance issued by the U.S. Department of Education (USDOE). 20 U.S.C. § 7904. USDOE issued its guidance on February 7, 2003. One part of the guidance addressed "Moments of Silence."[11]

> ***Moments of Silence***
>
> If a school has a "minute of silence" or other quiet periods during the school day, students are free to pray silently, or not to pray, during these periods of time. Teachers and other school employees may neither encourage nor discourage students from praying during such periods.

Besides the Pledge brouhaha detailed *supra*, Allred also had another curious practice. Nearly every day, she began her class by asking, "Does anyone have any prayer requests?" After students would offer "various dedications," Allred would hold a "moment of silence." She frequently opened this moment of silence by saying "Let us pray" and ended the moment with "Amen." This eventually became a daily ritual. One day, when the vice principal was observing the classroom, Allred attempted to begin her class when one of her students reminded her that she had forgotten the prayer requests. Allred then took prayer requests, began the moment of silence with "Let us pray," and concluded the ritual by having one student read aloud from the Bible. 370 F.3d 1252 at 1261.

Holloman's suit included an allegation that Allred's daily prayer ritual violated the Establishment Clause of the First Amendment. The federal district court rejected this claim, asserting there was no "clearly established" precedent within the 11th Circuit Court of Appeals that a moment of silence for prayer would be unconstitutional. The 11th Circuit reversed the district court on this aspect as well.

Even though it is questionable Allred was engaged in a legitimate job-related function (fostering character development and moral education), she was not empowered to do so in this manner. "Praying goes sufficiently beyond the range of activities normally performed by high school teachers and commonly accepted as part of their job as to fall outside the scope of Allred's official duties,

[11]For additional information, see "A Moment of Silence," **Quarterly Report** July-September: 2001.

even if she were using prayer as a means of achieving a job-related goal." Id. at 1283.[12] Allred lacked any valid secular purpose. "First, Allred's most basic intent unquestionably was to offer her students an opportunity to pray in a public school during the school day, and effectively encourage them to do so. By collecting prayer requests, and using the phrases 'let us pray' and 'amen,' she gave the practice of praying during the moment of silence her implicit imprimatur." Id. at 1285.

"Second, even accepting Allred's testimony that she hoped to use prayer as a way of teaching compassion, our analysis does not end there. While promoting compassion may be a valid secular purpose, teaching students that praying is necessary or helpful to promoting compassion is not." Id. at 1285-86.

The court also rejected Allred's contention that the prayer was "nondenominational." "Encouraging or facilitating any prayer clearly fosters and endorses religion over nonreligion, and so runs afoul of the First Amendment." Id. at 1288. The "brevity" of her moment of silence "does not alleviate her constitutional violation either." It is not a defense that the encroachment on the First Amendment was "relatively minor." Id. The court had "no trouble in concluding that these facts amount to blatant and repeated violations of the Establishment Clause." Id. at 1289. In addition, it "should go without saying that it is unconstitutional for a teacher or administrator (or someone acting at their behest) to lead students aloud in voluntary prayer." Id. The law cannot be more clearly stated. Id. at 1290.

ATHLETIC COMPETITION, STUDENTS WITH DISABILITIES, AND THE "SCHOLARSHIP RULE"

In 1999, the final federal regulations were issued, implementing the Individuals with Disabilities Education Act (IDEA), as reauthorized by Congress in 1997. 34 CFR. Part 300. Previous federal regulations required public agencies to ensure students with disabilities were included in all services and activities to the maximum extent appropriate as a "least restrictive environment" concept,[13] including access to non-academic and extracurricular services and activities so as "to afford children with disabilities an equal opportunity for participation in those services and activities."[14] "Non-academic and extracurricular services and activities" were defined then–and are defined today–as including, *inter alia*, "counseling services, athletics, transportation, health services, recreational

[12]The court was quick to note that "praying" is not always unrelated to a legitimate job-related function by a public school teacher, adding such examples as studying the Bible as part of a literature course, signing a religious hymn in music class, or analyzing a prayer for its poetic properties. 370 F.3d at 1283, *n.* 10.

[13]See, *e.g.*, 34 CFR § 300.553 (1993). The current version of this regulation expands upon the former language.

[14]See 34 CFR § 300.306(a) (1993).

activities, [and] special interest groups or clubs sponsored by the public agency..."[15] The Office of Special Education Programs (OSEP)[16] rebuffed suggestions that participation in extracurricular activities should not be a component of a child's Individualized Education Program (IEP), indicating that it would make no changes from the 1993 versions of both § 300.306 and § 300.553.[17]

The language, although relatively new to IDEA, has been a long-standing requirement under Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by recipients of federal financial assistance.[18] 29 U.S.C. § 794, 34 CFR Part 104. See generally 34 CFR § 104.37. Sec. 504 specifically requires equal opportunities for students with disabilities to participate in "interscholastic athletics" as well as club or intramural athletics. See 34 CFR § 104.37(c)(1).

Because Sec. 504 has been concerned for a longer period of time with equitable access to athletics by students with disabilities, a review of Letters of Findings and policy constructions by the Office for Civil Rights (OCR) is helpful in understanding current constructions.[19]

Qualified Person with a Disability

Alpena (AR) Public School District, EHLR 257:565 (OCR 1984). The public agency violated Sec. 504 when it refused a student with epilepsy the opportunity to participate on its basketball team even though he was qualified to play. The coach acknowledged the student would have made the team, but he cut him from the squad following a seizure during practice.

DeKalb County (GA) School District, 32 IDELR ¶ 8 (OCR 1999). The student had an accommodation plan. However, the accommodation plan did not address support services for extracurricular activities. The accommodation plan was designed solely for academic pursuits. The

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[15]See 34 CFR § 300.306(b) (1999).

[16]See 20 U.S.C. § 1402, creating the Office of Special Education Programs within the U.S. Department of Education.

[17]See **Federal Register**, Vol. 64, No. 48 at 12574 (Friday, March 12, 1999).

[18]Title II of the Americans with Disabilities Act of 1990 provides no substantive provisions beyond Sec. 504's pre-existing requirements with regard to athletics in publicly funded schools and equal opportunities for students with disabilities to participate. Sec. 504 does not contain disability categories. Rather, it is concerned with ensuring persons with disabilities do not experience discrimination in programs and services that receive federal financial assistance. All students eligible for services under IDEA would also have the added protections of Sec. 504. The reverse is not necessarily so. Eligibility under these two laws is different.

[19]The Office for Civil Rights (OCR) is the investigative arm of the U.S. Department of Education. Its jurisdiction involves all federal laws that proscribe discrimination in programs or services that receive federal financial support, including Sec. 504, the Americans with Disabilities Act of 1990 (ADA), Title VI, and Title IX.

student attended try-outs for the basketball team but was cut. The basketball coach indicated the student lacked the skills necessary to make the team. The reason for the student's exclusion from the basketball team was not based on the student's disability and did not violate Sec. 504.

Salem (NH) School District, 35 IDELR 260 (OCR 2001). The student transferred to the public school with an IEP. The school provided services but recommended he pursue a General Educational Development (GED) certificate rather than a standard diploma because of his age and lack of credits. The student wanted to participate on the hockey team but his age prevented his eligibility. The student's school attendance was spotty, with many unexcused absences and disciplinary referrals. Under the by-laws of the New Hampshire Interscholastic Athletic Association, to be eligible to play hockey, a student must: (1) be age-eligible; (2) be in good scholastic standing, which includes academic grades and school attendance; and (3) not have played for more than eight consecutive semesters beyond the eighth grade. When the student enrolled in this school, he was one month short of his 19th birthday. He had also exhausted the eight-semester requirement. Although the principal is authorized to grant student-specific waivers–and has done so in the past, including students with disabilities–the student in this dispute was ineligible because of age, the eight-semester rule, his poor attendance, his grades, and his behaviors at school.

Accommodations and Accessibility

Wichita Falls (TX) Independent School District, 33 IDLER ¶ 167 (OCR 1999). The school district failed to provide a sign-language interpreter to a deaf student, thus preventing him from participating on the school's basketball team or participate in other extracurricular activities. The school district entered into a resolution agreement with OCR to remedy the school's failure to provide equal opportunities for deaf students to participate in the school's non-academic and extracurricular services and activities. See also Lambert v. West Virginia Board of Education, *infra.*

Washoe County (NV) School District, 35 IDLER 15 (OCR 2000). OCR did not provide the facts underlying this case. From the lengthy resolution agreement, it appears that a student with a disability was prevented by the swim coach from participating in a district-sponsored swimming event. The parents complained to school officials, but their subsequent investigation was inadequate (grievance procedures are required under 34 CFR § 104.7). Although school staff were to receive training in Sec. 504 requirements, the swim coach was singled out to receive special attention "regarding disabled person's rights to access in the district's programs and activities, including extracurricular activities." Should the student express an interest in participating in the program in the future, "the district will allow the student to participate and ensure that any necessary aides, services, or accessibility accommodations are provided."

Evaluation Procedures

Cardinal (OH) Local School District, 31 IDELR ¶ 13 (OCR 1998). A ten-year-old student wanted to participate in recreational basketball program operated as a joint venture by the school district with a local community. The student has a rare medical disability (dysautonomia), which involves an abnormal functioning of the autonomic nervous system, making it difficult to regulate response to outside ambient temperature. The student's application contained a letter from his physician,

indicating the student could develop a life-threatening elevation of temperature in ordinary situations, such as when participating in sports. The basketball program sponsors sought more information from the physician, but they were rebuffed by the parents, who insisted sufficient information had already been presented. The basketball program did not run afoul of Sec. 504. The student's participation was contingent upon additional medical information regarding how the student could safely participate in the program. The program's request for additional medical information was "reasonable and rational" and displayed "an effort...to accommodate the student's disability rather than deny or exclude him from participating in the sports program."

Manifestation Determination (Re-evaluation before Significant Change of Placement)

Mt. Diablo (CA) United Sch. Dist., 30 IDELR 994 (OCR 1999). The school initiated a requirement that students participating in extracurricular activities must maintain a 2.0 grade point average (GPA). A student with a learning disability, as well as visual and auditory deficits, was placed on academic probation when his GPA fell below 2.0. The school declined to evaluate the effects of the students disability on the GPA, which ran afoul of Sec. 504 requirements. The school agreed to establish a process whereby the effects of a disability would be assessed prior to the institution of any sanction.

Maine School Administrative District #1, 37 IDELR 160 (OCR 2002). A student with a disability claimed the school district discriminated against him on the basis of his disability when he was excused from the hockey team for failure to satisfy team attendance standards. The student had three unexcused absences from practice, two involving alcohol-related convictions. He also missed two games when he was not permitted to travel with the team after missing his 7th period class without a legitimate excuse. The school district determined that these absences were unrelated to his disability and constituted violations of the attendance rules. The rules indicate a student will be removed from an interscholastic team for the remainder of the season where the student has either three missed practices without an excuse or two missed games without an excuse. The student had both. The student's IEP did contain a Behavior Management Program (BMP), but the BMP did not indicate any specific accommodations or exemptions relative to participation in sports. OCR concluded the student was not removed from the hockey team based on his disability but was removed based upon his violation of the school district's attendance rules.

The Indiana High School Athletic Association and its "Scholarship Rule"

The Indiana High School Athletic Association (IHSAA) is a private entity engaged in the sanctioning of interscholastic athletic competition at the secondary level. The vast majority of its members are public school districts**.** As a part of its sanctioning process, the IHSAA, as virtually all its counterparts in the other States, has a series of by-laws addressing various aspects of athletic competition including, *inter alia*, eligibility requirements for prospective student-athletes. These by-laws address such areas as age, residency, enrollment, attendance, amateurism, recruiting and undue influence, red-shirting, length of eligibility, and scholarship. The so-called "Scholarship Rule" reads as follows:

Rule C-18-1

> To be eligible scholastically, students must have received passing grades at the end of their last grading period in school in at least seventy percent (70%) of the maximum number of full credit subjects (or the equivalent) that a student can take and must be currently enrolled in at least seventy percent (70%) of the maximum number of full credit subjects (or the equivalent) that a student can take. Semester grades take precedence.[20]

Although the IHSAA's Scholarship Rule serves a valuable if not obvious purpose, the IHSAA's member schools that receive federal financial assistance (all public schools) must balance this rule with the requirements of the Individuals with Disabilities Education Act, notably 34 CFR §§ 300.306, 300.553, and Sec. 504 of the Rehabilitation Act of 1973, notably 34 CFR § 104.37(c).[21] IDEA requires students with disabilities to participate in curricular and extra-curricular activities with their peers without disabilities to the maximum extent appropriate; Sec. 504 requires that students with disabilities be provided equal opportunities for participation. These requirements present a dilemma where the student, by virtue of his disability, cannot satisfy the Scholarship Rule stated above. This would involve students with disabilities who are not "diploma track." That is, students whose respective IEPs are geared toward more functional curricula, including courses specifically designed for the students but not necessarily "credit producing." Such students may receive passing grades (often pursuant to a modified grading scale) but do not participate in "full credit subjects," although it is arguable that their course work would be "the equivalent" that appears parenthetically in the Scholarship Rule. Students with disabilities are required to have the same instructional day as all other students absent individualized justification by the student's case conference committee, which would have to be documented in the student's IEP. See 511 IAC 7-21-3(c). Students who are not on the diploma track have not typically participated in interscholastic athletic competition principally because students in this population rarely demonstrate athletic prowess. However, there are some sports that do not cut prospective athletes from their participant rosters. These are typically individual sports, such as cross country and track, and not competitive team-roster or contact sports, such as volleyball, basketball, football, and baseball.

Along Came Sam

Sam Gambrel lives in Shelby County, Indiana. He is in his senior year. Sam will not be able to satisfy the requirements for a regular high school diploma. Instead, his IEP is geared toward his

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[20]The Scholarship Rules are preceded by a philosophical statement that provides, in part: "If students cannot successfully carry and pass a normal minimum load of formal classroom work and simultaneously undertake the extra demands upon time and energy required by interschool participation, they should postpone their commitment to interschool programs and concentrate time and effort on achieving in the classroom." The references are to the 2003-2004 IHSAA handbook.

[21]The IDEA provision is incorporated into the Indiana rules at 511 IAC 7-27-9(b). The Indiana rules are known informally as "Article 7." The Sec. 504 provision does not appear in Article 7 because it is a non-discrimination requirement. Article 7 does not address non-discrimination. Each public school district is responsible for its own compliance with Sec. 504 and other non-discrimination laws.

earning a "certificate of completion."[22] In his junior year, Sam wanted to run cross country for his high school team, but due to his disability and his concomitant educational programming, he could not satisfy the requirements of the Scholarship Rule. He sought a waiver from the IHSAA but was unsuccessful. He was permitted to participate but not on the varsity level. Although he was and is eligible for services under IDEA and Article 7, he elected to pursue the issue through the U.S. Department of Justice by proceeding under the non-discrimination requirements of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*

Over the course of his junior year and through the summer, the IHSAA consulted with various entities, including the Indiana Department of Education and Indiana Protection & Advocacy, the latter actually representing Sam's interests. Although other State sanctioning bodies have rules that address students with disabilities, the IHSAA has not had such a rule. In the 100 years since the IHSAA's founding in 1903, this issue had not been raised

On August 5, 2004, the IHSAA approved an emergency by-law, amending the Scholarship Rule to include a provision that would affect students such as Sam. The new language reads as follows:

> A student who—
> (a) Is receiving special education and related services pursuant to an individual education program (IEP);
> (b) Is not earning credits toward a diploma;
> (c) Is working toward a certificate of completion, certificate of attendance, or the equivalent; and
> (d) The student's IEP precludes satisfaction of the IHSAA academic standards contained in Rule 18-1,
> may meet such academic requirements, provided the student is making satisfactory progress toward the goals, objectives and benchmarks contained in the student's IEP, as determined by the student's progress reports and case conference committee,[23] and certified by the building principal.

This new language resolved the impasse (and the ADA complaint as well). Sam, his cross country coach, and his father all expressed relief that the matter has been resolved, especially in advance of the first cross-country meet on August 23, 2004. "I think this is a huge confidence builder," Todd McCullough, Sam's cross-country coach said. "This is really going to help him out knowing that he can contribute to the team. He ran all summer and is in pretty good shape. We're looking for him to help out the team in a huge way."[24]

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[22]See 511 IAC 7-28-3(a).

[23]"Case conference committee" is the Indiana terminology for the IEP Team. See 511 IAC 7-17-10.

[24]"Landmark Step for IHSAA," *The Indianapolis Star* (August 6, 2004).

Sam, when he learned he would be eligible, said, "I'm surprised and shocked. I figured it would go to the court and we'd have to put up a huge fight." He added that his "first goal" was "I just wanted to run varsity. But now I'm happy I'm helping others, too. This is like a dream."[25]

Not all disputes have been resolved without resort to litigation. Prospective student-athletes have prosecuted claims under the IDEA, Sec. 504, or the ADA–or sometimes combinations thereof–in order to determine or secure their eligibility to participate in interscholastic competition.

Other Cases of Interest

1. Lambert v. West Virginia Board of Education, 447 S.E.2d 901 (W. Va. 1994). This case involved a high school student who was deaf from birth. She had difficulty understanding the coach's directions. Her parents requested a signer to assist her, but this request resulted in her dismissal from the team just before post-season tournament play. The court found the school responsible for providing the signing services. Under the IDEA and Sec. 504, students with disabilities are entitled to an equal opportunity to participate in extracurricular activities to the same extent as their peers without disabilities. In this case, the student already required the assistance of a signer in her academic pursuits. There was no need for the school to investigate further whether this service was necessary for her extracurricular endeavors. See also Wichita Falls (TX) Independent School District, 33 IDLER ¶ 167 (OCR 1999), *supra*.

2. Dennin v. Connecticut Interscholastic Athletic Conference, 913 F.Supp. 663 (D.Conn. 1996). A 19-year-old student with Down Syndrome sought to enjoin the enforcement of an age-limitation rule which would have prevented him from participating on his school's swim team. Because of his special needs, he spent an additional year in middle school. Participation on the swim team was specified in his IEP. Anyone can try out for the swim team; no one is cut. The athletic conference by-laws rendered ineligible a high school student who turns age 19 before September 1. The primary purposes for the rule are to prevent competitive advantages; to protect younger students; and to discourage the delaying of one's education for athletic purposes ("red shirting"). Dennin turned 19 on September 1. His times were not particularly competitive and swimming is not a contact sport. He sought a waiver of the rule, but the conference refused. In granting the injunction, the court found that under IDEA, Sec. 504, and the Americans with Disabilities Act (ADA), Dennin was entitled to "reasonable accommodations" (waiver of the age rule) because the waiver would not fundamentally alter the athletic program or impose an undue burden. Although the age eligibility rule is neutral on its face, individual circumstances may cause its application to be discriminatory. In this case, the sole reason the student is 19 and still in school is the existence of his disability. Application of the age rule under these circumstances would violate Sec. 504 and the ADA. The Second Circuit Court of Appeals declined to review the decision because the swim season was over and the issue was moot. 94 F.3d 96 (2d Cir. 1996).

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[25] Id.

3. Pottgen v. Missouri High Sch. Athletic Assoc., 857 F.Supp. 654 (E. D. Mo. 1994), rev'd on other grounds, 40 F.3d 926 (8th Cir. 1994), applying a similar age eligibility rule, but in this case to prevent a 19-year-old disabled student from playing baseball.

4. Johnson v. Florida High School Activities Association, Inc., 899 F.Supp. 579 (M.D. Fla. 1995), applying a case-by-case analysis to an age eligibility situation in permitting a disabled student to participate in wrestling and football because, given the student's relative lack of athletic prowess and the reasons for his continuing in school till age 19, he posed no threat to other students and was not the result of an attempt to gain a competitive edge. The purpose of the rule was satisfied, and waiver would be a "reasonable accommodation."

5. Hoot v. Milan Area Schools, 853 F.Supp. 243 (E.D. Mich. 1994). A student with Attention Deficit Hyperactivity Disorder (ADHD) had been denied participation in athletics because he lacked sufficient credits required by the athletic association. The school district requested the association waive its rule, but the association refused. The student was subsequently identified as eligible for special education services, eventually having his credits and his athletic eligibility restored. In denying the association's Motion for Summary Judgment based on mootness, the court said questions remained as to the application of Sec. 504 and the ADA to a non-recipient of federal financial assistance (the Association) and whether a recipient member can avoid its responsibilities by relying upon the actions of a non-recipient.

6. Sandison v. Michigan High School Athletic Association, 863 F. Supp. 483 (E.D. Mich. 1994). Later in the year, the federal court (different judge) granted an injunction to students with disabilities, enjoining the association from enforcing its age limitation to the students for participating in athletics (in this case, track and cross country). In granting the injunction, the court decided an issue the Hoot court did not. The court decided that the Association is subject to the requirements of Sec. 504 and the ADA because it is an indirect recipient of federal financial assistance, is a private entity operating a public accommodation, and is a public entity. Id. at 486, 489-90. However, the Sixth Circuit Court of Appeals reversed, finding that the issue of participation was moot because the respective athletic seasons had ended. The Court of Appeals also questioned whether the students could have succeeded on their ADA claims against the non-recipient athletic association. Sandison v. Michigan High School Athletic Association, 64 F.3d 1026 (6th Cir. 1995).

7. Kling *et al.* v. Mentor Public School District *et al.*, 136 F.Supp.2d 744 (N.D. Ohio 2001). The school district was ordered by an Impartial Hearing Officer (IHO) and State Review Officer (SRO), in due process procedures conducted pursuant to 20 U.S.C. § 1415 of the IDEA, to develop a program placing the student on the track and cross-country teams. The school refused to do so, asserting it would face sanctions from the State athletic association for violating a by-law that prohibited 19-year-old students from participating in

interscholastic athletic competition.[26] The student was born with a hearing impairment and cerebral palsy. These disabilities prevented him from starting second grade until he was approximately ten (10) years old. The late start of second grade resulted in the student remaining in high school at age 19. During his freshman year, the physical education teacher required his class to complete a one-mile run. It took the student the entire class period to do so. He was later encouraged to try out for the cross country and track teams. He spent the summer training with his father for cross country. During his sophomore year, he participated on these teams, which resulted in "notable improvements in both his academic work and his sense of personal well-being." Prior to his junior year, he was informed that the State athletic association rules prohibited him from further participation because of his age. The "Age Rule" is designed to prevent an unfair advantage to one team, to help ensure the safety of all players, and to give every school a "level playing field." The court did not dispute the "Age Rule" serves a valid and important purpose. However, the student typically finishes last in every race, such that his participation–at any age–will not provide an "unfair advantage." During the IEP Team meeting to review and revise the student's IEP for his junior year, the student's parents proposed goals that addressed his participation on the athletic teams, but the school declined to consider these goals. The parents exercised their right under IDEA to an impartial due process hearing. The IHO found that participation in interscholastic athletics (track and cross country) is a necessary component of the student's IEP "without which he cannot attain educational benefit or FAPE." The SRO affirmed the IHO's decision. Despite being ordered to incorporate the student's athletic participation into his IEP, the school refused. The court found the student had "suffered irreparable harm insofar as he has been excluded from competition and relegated to merely suiting up and practicing. [The student] was encouraged by school officials to prepare, join, and participate fully in the teams. His participation resulted in academic, physical, and personal progress. [He] has run afoul of the Age 19 Rule only because of his disabilities." However, IDEA takes precedence over an athletic association's by-laws. The court entered an injunction on the student's behalf, entitling him to participate and restricting the athletic association from leveling sanctions against the public school because of his participation.[27]

8. Cruz v. Pennsylvania Interscholastic Athletic Association, Inc., 157 F.Supp.2d 485 (E.D. Pa. 2001). The student's IEP indicated his need to participate in extracurricular activities, including sports. The student was a member of the varsity football, wrestling, and track teams. However, the student was 19 years old. The association would not waive its Age Rule, resulting in the student and the school district initiating legal action under the ADA

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[26]The school district's position could have resulted in a more severe penalty. A State, as a condition for receipt of IDEA funds, must have a complaint investigation process, which includes issues such as the purported failure to implement a hearing officer's decision. Refusal to comply with such an order can result in the withholding of all federal funds to the school district, a considerably greater penalty than any athletic association could impose. See 34 CFR §§ 300.660-300.662.

[27]Because the student and his parents were likely to be the "prevailing parties" in this matter, the school district faced the payment of attorney fees under the IDEA. See 20 U.S.C. § 1415(i).

for injunctive and permanent relief. The student's disabilities were such that he did not enter elementary school until 11 years of age. As a result, he had not had "comparable opportunities" as compared to other students. He reads on a third-grade level. His participation on athletic teams had a direct impact on his academic achievement and interpersonal relations.[28] His coaches testified that the student has no competitive advantage, is not a safety risk, does not displace other athletes, and is a positive influence. He was described as a marginal athlete as far as prowess. In addition, the student has not exhausted the eight semesters of participation allowed by the association's rules. Although the association presented itself as a private, not-for-profit organization, the court determined it was a "public entity" for the purpose of applying Title II of the ADA, which means the association cannot deny the benefits of the services, programs, or activities to the student if the student is a "qualified individual with a disability." This term is defined as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[29]

The court noted there is a conflict among the federal courts as to whether age is an "essential requirement." The court relied heavily upon Pottgen and Sandison, *supra*, as well as Eric Washington v. IHSAA, 181 F.3d 840 (7th Cir. 1999), *cert. den.* 528 U.S. 1046, 120 S. Ct. 579 (1999). A "rule is essential to a program," the court observed, "unless it can be shown that the waiver of it would not fundamentally alter the nature of the program." In this case, the student "would not fundamentally alter the nature of the competition." A waiver of the Age Rule would be necessary for him to compete, even on the limited basis that he would. The central question, then, is whether such an accommodation–waiver of the Age Rule–is reasonable. The association stated that such a waiver would not be reasonable and would impose an "undue burden" on it to create a waiver procedure if the court ruled in the student's favor. The court was unpersuaded, especially as the association presently conducted investigations and granted waivers involving its eight-semester and transfer rules. In this case, the waiver process would require the student to have an IEP in place that requires participation in interscholastic sports, a very narrow consideration and certainly a very small population. Accordingly, the court found the student was entitled to benefits under the ADA, that he would suffer irreparable harm if he were not permitted to participate in football and track, the harm would be minimal to the association, and the public interest would benefit.

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[28]The football coach related an incident during the student's freshman year when he actually scored a touchdown. He was so excited he "hugged the official as he was raising his arms" to indicate the touchdown.

[29]42 U.S.C. § 12131(2).

The student was entitled to a permanent injunction against the association applying its Age Rule to him.

COURT JESTERS: PSITTACINE BANE

This story is for the birds.

No, it *really* is.

"Who knows what evil lurks in the hearts of men?"[30] wrote federal Circuit Judge William H. Mulligan in the introduction to United States v. Byrnes, 644 F.2d 107, 108-09 (2nd Cir. 1981). "Although the public is generally aware of the sordid trafficking of drugs and aliens across our borders, this litigation alerts us to a nefarious practice hitherto unsuspected even by this rather calloused bench–rare bird smuggling."

This case began as part of a joint American-Canadian investigation of traffickers in rare birds. "While Canadian geese have been regularly crossing, exiting, reentering, and departing our borders with impunity, and apparently without documentation, to enjoy more salubrious climes, those unwilling or unable to make the flight, either because of inadequate wing spans, lack of fuel or fear of buck shot, have become prey to unscrupulous traffickers who put them in crates and ship them to American ports of entry with fraudulent documentation in violation of a host of federal statutes." Id. at 109.

One such suspected trafficker of such fowl deeds was Kenneth Clare, a Canadian, as well as a California attorney named Edward R. Fitzsimmons. Clare would ship exotic birds into the United States but misrepresent their value, their species, and even the number birds in the containers so as to avoid the payment of duties, inspection, and quarantine. "When one learns that an adult swan stands some four and a half feet tall and is normally ill-tempered, the reluctance of a border inspector to make a head count is understandable," the court explained. But in this case, Clare had gone too far. "...Clare even had the audacity to pass off as Canadians, birds whose country of origin was England!" Id.

In February of 1975, Fitzsimmons reportedly purchased four trumpeter swans and two red-breasted geese from Clare. The shipping papers identified the swans as "mute swans," which are less valuable. The birds were airlifted from New York to San Francisco where defendant Byrnes, a

[30]This famous saying refers to "The Shadow," the crime-fighting alter ego of Lamont Cranston, a wealthy playboy who learned secret mystical powers that enabled him to "cloud men's minds" and thereby combat evil. "The Shadow" was a popular radio series, beginning in the 1930's and continuing to 1954. Orson Welles played the character on radio in the mid-1930's.

secretary to Fitzsimmons, retrieved them. Byrnes was no ordinary secretary. She "was a *quondam* zoologist at the London Zoo and knowledgeable about ornithological matters."[31] Id.

As she drove from the airport, Byrnes testified that she noticed that she heard no noises from the crates, which is odd. As she stated in her subsequent grand jury testimony, the male trumpeter swan, during courtship, "struts around with his neck and head held high and makes this marvelous little trumpeting sound."[32] Id. at 109. She stopped her car and opened the crates. The only trumpeting to be heard was "Taps": "[A]ll the birds were dead and, in fact, so stiff that she assumed they had been dead for some time (D.O.A.). She promptly drove to a municipal dump where the birds were interred in unconsecrated ground." Id. As will be noted below, however, this was not entirely true.

The court paused at this point in its dissertation to mourn the apparent passing (and the undignified disposal) of the birds by quoting from *Tithonus* by Alfred Lord Tennyson:

> Man comes and tills the field and lies
> beneath,
> And after many a summer dies the
> swan.

Id. at 111. Byrnes was eventually convicted of two counts of making false declarations to the grand jury. She appealed to the U.S. 2nd Circuit Court of Appeals, which required Judge Mulligan and the other two members of the panel to review the proceedings in the federal district court below. One of the four government witnesses, Ida Meffert, "had emigrated from Germany and had obvious difficulty with the English language." Several trial exchanges read more like a Marx Brothers' routine.

> She testified that she was a collector of Australian parrots in Hayward, California, and described these parrots as "citizens." The court interjected: "A citizen bird?" The witness answered: "Yeah, the whole birds is citizen."

Id. at 110. This puzzling exchange was never explained by the district court, assuming explanation was possible. The 2nd Circuit, however, figured out (maybe) what the witness was attempting to say.

> There are various record references to "citizen" birds which was confusing since those at issue here were aliens [*i.e.*, Australian]. We are persuaded, however, that the word spoke was "psittacines" (parrots) and not "citizens." The confusion of the scrivener is understandable.

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[31]"Quondam" is a Latin word meaning "former." The emphasis on the word is original.

[32]The court editorialized about this comment, adding "*De gustibus*. The mute apparently courts in silence." (*De gustibus* is a shortened reference to "De gustibus non disputandum est" or, in English, "There is no disputing about tastes.")

Id. at *n.* 6. Meffert was also involved in the Clare-Fitzsimmons-Byrnes matter. She testified that Byrnes delivered to her four live swans and two live red-breasted geese, as arranged by Fitzsimmons who wanted Meffert to provide "room and board for some of his exotic wildlife." After a few days, one of the swans died "and she preserved his leg in her freezer to establish the demise." A curious exchange occurred during the trial where Meffert indicated she did not believe swans and geese were birds at all but were actually "waterfowls." On cross examination, she indicated that sparrows, crows, and eagles are "birds" but ducks are "ducks" and seagulls are "seagulls" and not birds, and a parrot is definitely not a bird. (It's a "citizen," as we have learned.) She couldn't answer about swallows because "I don't know what a swallow is."

But the court wasn't swallowing this testimony. Meffert's peculiar ornithological views notwithstanding, the actual parties involved stipulated that swans and geese were, in fact, birds. "The swan leg was not offered in evidence as an exhibit," however. To which the 2nd Circuit opinion noted:

> Let the long contention cease!
> Geese are swans, and swans are geese.[33]

Id. at *n.* 8. But the court couldn't leave Mrs. Meffert's testimony regarding "birds" alone without further comment.

> For a liberal construction of the term "birds" by a Canadian court, see ***Regina v. Ojibway***, 8 Criminal Law Quarterly 137 (1965-66) (Op. Blue, J.), holding that an Indian who shot a pony which had broken a leg and was saddled with a downy pillow had violated the Small Birds Act which defined a "bird" as "a two-legged animal covered with feathers." The court reasoned that the statutory definition
>
> > "...does not imply that only two-legged animals qualify, for the legislative intent is to make two legs merely the minimum requirement.... Counsel submits that having regard to the purpose of the statute only small animals 'naturally covered' with feathers could have been contemplated. However, had this been the intention of the legislature, I am certain that the phrase 'naturally covered' would have been expressly inserted just as 'Long' was inserted in the Longshoremans' Act.
> >
> > "Therefore, a horse with feathers on its back must be deemed for the purpose of this Act to be a bird, ***a fortiori***, a pony with feathers on its back is a small bird." *Id*. at 139.

644 F.2d at 112, *n*. 9.

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[33]Matthew Arnold, *The Scholar Gypsy, The Last Word* (Stanza 2).

This is a tongue-in-beak judicial observation, however. As the court knew–but did not indicate–the case of *Regina v. Ojibway* is entirely fictitious.[34]

While *Regina* is a joke, Byrnes' conviction was not. Her goose was cooked. "The judgment of conviction is affirmed," Judge Mulligan wrote. "[J]ustice has triumphed and this is my swan song."

QUOTABLE . . .

> [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.
>
> U.S. Supreme Court Justice Sandra Day O'Connor, concurring opinion in Elk Grove Unified School District *et al.* v. Newdow *et al.*, 124 S. Ct. 2301, 2327 (2004)**.**

UPDATES

Educational Malpractice

Although most states do not recognize "educational malpractice" as a viable tort claim,[35] this has not halted litigants from repackaging claims under other theories of recovery.

1. In Simon *et al.* v. The Celebration Company *et al.*, 2003 Fla. App. LEXIS 18397 (Fla. App. 2003), reported in **Quarterly Report** October-December: 2003,[36] a divided Florida Court of Appeals sided with parents who sued The Celebration Company and several universities, asserting the defendants engaged in "negligent misrepresentation" and "fraudulent inducement" when they encouraged the Simon family to relocate to the Town of Celebration and enroll their children in The Celebration School, a public school that represented it offered "a quality education based upon a time-tested and successful curriculum known as 'best practices.'" The children purportedly regressed academically and socially. The trial court dismissed the complaint because the claims were essentially ones for "educational

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[34]See "Horse Feathers!", **Quarterly Report** January-March: 2004.

[35]Indiana does not recognize "educational malpractice." See Timms v. M.S.D. of Wabash Co., EHLR 554:361 (S.D. Ind. 1982), and Bishop v. Ind. Technical Vocational College, 742 F.Supp. 524 (N.D. Ind. 1990). Also see "Educational Malpractice: Emerging Theories of Liability," **Quarterly Report** April-June: 2001 and "Educational Malpractice," **Quarterly Report** April-June: 2003.

[36]"Real Estate Sales and School Accountability Laws."

malpractice," claims not cognizable under Florida law. The Florida Court of Appeals reversed, finding the parents had stated claims for fraudulent inducement and negligent misrepresentation. The dissent did not believe the claims were viable and would have supported the trial court's finding that the claims were disguised claims for educational malpractice.

On June 4, 2004, the Florida Court of Appeals, *sua sponte*,[37] withdrew its earlier opinion and substituted a new opinion in which all the judges agreed. In Simon *et al.* v. The Celebration Company *et al.*, 2004 Fla. App. LEXIS 7942 (Fla. App. 2004), rather than reinstating the claims for fraudulent inducement and negligent misrepresentation, the appellate court found the trial court erred when it dismissed these claims "with prejudice."[38] The trial court should have given the Simons leave to amend their claims. "On remand, we direct the court's attention to the fact that a complaint for fraud must specifically allege sufficient ultimate facts on each element of the claim. [Citation omitted.] The instant complaint fails to meet this pleading requirement because it fails to allege the false representations with sufficient specificity, and fails to allege cognizable fraud damages." The Simons were too vague in some respects and failed to show how certain representations made to them were false. "The complaint simply alleges the conclusory statement that the representations were false, a legally insufficient allegation under the strict pleading requirements for a claim predicated on fraud. [Citation omitted.] The lack of specificity is particularly troublesome here where nine separate defendants are lumped together in each count in a complaint that often fails to particularize which of the nine defendants made which statements."

In addition, any action for fraud must have an element of actual damages. Damages "must be pled using specific, ultimate facts. [Citation omitted.] Moreover, fraud cannot form the basis for recovery of damages unless the damages directly arise from the fraud and are causally connected to the fraud. [Citations omitted.] The Simons' complaint fails to assert how their alleged damages were causally related to the alleged fraud."

2. California was the first state to address directly the concept of "educational malpractice" or "educational malfeasance." In Peter W. V. San Francisco Unified School District, 60 Cal. App.3d 814, 131 Cal. Rptr. 854 (Cal. App. 1976), the appellate court declined to recognize such a cause of action. A number of federal and state courts have followed suit (no pun intended). Over time, five policy reasons to refuse such a cause of action have emerged:
(1) There is an absence of an adequate standard of care;
(2) There is uncertainty in determining damages;
(3) There would be an enormous burden placed on schools by the potential flood of litigation that would flow from recognizing such a cause of action;

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[37]*Sua sponte* means the court acted on its own responsibility without a party first making a motion.

[38]A claim dismissed "with prejudice" cannot be amended and refiled. This is a final judgment on the issue so dismissed.

(4) There should be deference shown to the educational system to carry out its internal operations, including the employment of teaching methodologies; and
(5) There is a general reluctance of courts to interfere in an area regulated by legislative standards.

Notwithstanding California's status as the first state to address "educational malpractice"–and decline to recognize it–new approaches to publicly funded education are creating new theories of recovery. In Joey Wells v. One2One Learning Foundation, 10 Cal. Rptr.3d 456 (Cal. App. 2004), a decision delivered on March 3, 2004, students enrolled in charter schools sued, alleging, *inter alia*, intentional misrepresentation, negligent misrepresentation, and breach of contract.

The Joey Wells case brings a new player (or players) to the table—Charter Schools. California's legislature, as nearly 40 other legislatures, enacted charter school legislation with the intent "to improve pupil learning, increase learning opportunities, encourage innovation in our public schools, create professional opportunities for teachers, provide expanded choices of educational opportunities, hold schools accountable for their performance, and provide vigorous competition within the public school system." 10 Cal. Rptr.3d at 460 (internal punctuation and citation omitted).

The plaintiffs were enrolled in three charter schools that operated as "distance learning schools" but were more like virtual schools.[39] See, generally, Id. at 461-62. "Educational facilitators" may or may not have been licensed teachers. The charter schools were diligent in obtaining parent signatures to forms to indicate "attendance" but apparently not so diligent in providing the necessary equipment and instruction. According to the plaintiffs, the parents provided the instruction to their children (in effect, home-schooling their children). Plaintiffs then sued, alleging violation of California's Business and Professions Code, intentional misrepresentation, negligent misrepresentation, breach of contract, and violation of California's False Claims Act. Id. at 460-61. The trial court dismissed all claims based on Peter W., finding that these were claims for "educational malfeasance."

The Court of Appeals affirmed as to the claims under the Business and Professions Code ("Unfair Competition Law" or UCL), breach of contract, intentional misrepresentation, and negligent misrepresentation because these are all claims of "educational malfeasance." A charter school is a public school for UCL purposes. As such, it is not within the purview of the UCL. Legislation is explicit in this regard. Id. at 465. The charter schools may not be subject to the typical public oversight and accountability of a public school, but they are still subject to oversight, including revocation of the charter by the authorizing agency or the

[39]Something of a distinction should be made. The court did not make a distinction–or even refer to "virtual schools"–but "distance learning" typically involves "real time" instruction where a student or a teacher is at a remote location but technology enables them to participate or teach in "real time" in a virtual classroom. "Virtual schools" are task-oriented over a period of time and do not involve the students in "real time" instruction.

State Board of Education, and must consult local and state educational agencies. Id. The charter schools are a "part of the system of common schools provided for in the California constitution," must be "free, nonsectarian, open to all students, and may not discriminate based on ethnicity, national origin, gender, or disability." Id. at 466. They must abide by certain statewide standards, including the employment of licensed teachers. Id.

With respect to the breach of contract and misrepresentation allegations, Peter W. precludes these causes of actions. The court, quoting Peter W., noted the inherent problem under such a theory of recovery:

> On occasions when the Supreme Court has opened or sanctioned new areas of tort liability, it has noted that the wrongs and injuries involved were both comprehensive and assessable within the existing judicial framework. This is simply not true of wrongful conduct and injuries allegedly involved in educational malfeasance. Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might–and commonly does–have his own emphatic views on the subject. The "injury" claimed here is plaintiff's [Peter W.'s] inability to read and write. Substantial professional authority attests that the achievement of literacy in the schools, or its failure, are influenced by a host of factors which affect the pupil subjectively, from outside the formal teaching process, and beyond the control of its ministers. They may be physical, neurological, emotional, cultural, environmental; they may be present but not perceived, recognized but not identified.

Id. at 467, quoting Peter W., 60 Cal.App.3d at 824. By recognizing such a "duty of care," the court warned, would expose schools to a host of tort claims–real or imagined–from disaffected students and their parents. Id. There are "two lessons," the court wrote, that can be drawn from the line of cases declining to recognize "educational malfeasance":

(1) "First, a public school student may not sue a public school because that school failed to properly teach that student." Such matters are suitable for resolution through "the political and social arenas," including the legislature. Id. at 468.

(2) "The second lesson we draw from these cases is no matter what the cause of action, if a plaintiff is suing a public school for damages based upon the quality of education or lack of education, that cause of action is barred." Id. at 469.

The "breach of contract" claim could not succeed either, notably because there is no contract as such. Notwithstanding, "a claim for educational malfeasance that is pled in the form of a breach of contract claim is barred by the educational malfeasance doctrine." Id.

The False Claims Act is a different matter, however. As the Court of Appeals noted cryptically in the introductory part of its decision, "The Charter Schools Act...is not a license for a charter school to fraudulently obtain state funds free from judicial review." Id. at 460. The plaintiffs were not seeking damages for themselves but were alleging the charter schools defrauded the state by collecting $20 million in state educational funds without providing the instruction and materials it was required to provide. This claim is not one for "educational malfeasance," the appellate court determined, thus reversing the trial court in this respect. California's False Claims Act provides for civil penalties against anyone who knowingly presents a false claim to the state for payment or approval. State law allows a civil action to be initiated by a person ("a *qui tam* plaintiff"). Id. at 471. It is noteworthy the plaintiffs do not seek reimbursement for themselves but for the State, "thus fulfilling the fundamental purposes of the False Claims Act of protecting the public fisc." Id. at 472, 474.

Unlike "educational malfeasance" claims—where the wrongs and injuries "are not comprehensible and assessable within our existing judicial framework," classroom methodology creates "no readily acceptable standards of care," and there are other "unrelated and unquantifiable factors [that] may interfere with learning"—the plaintiffs' allegations under the False Claims Act are independent from classroom methodology and are readily ascertainable.

> A charter school that seeks money from the State of California for doing nothing more than collecting attendance sheets from children has submitted a false claim to the state when it asserts it has provided those children with education. The gravamen of the wrong and injury alleged here is straightforward and comprehensible–the defrauding of the state. The duty is to submit honest claims. The breach is submitting a false claim. The measure of the injury to the state is the funds the defendants obtained based upon their fraud. These are bread-and-butter issues of the judicial system which are litigated on a daily basis, not the amorphous problems of an educational malfeasance claim.

Id. at 473. Such claims, the court noted, do not "infringe on any sovereign power of the schools to teach because they do not have the sovereign power to fraudulently obtain state funds." Id. at 473-74. The appellate court also noted that allegations under the False Claims Act do not require the *qui tam* plaintiff to first file a notice of Tort Claim with the targeted public entity. Id. at 475-76, 477. The False Claims Act matter was remanded to the trial court.

This may not be the final chapter in this charter school saga. On June 23, 2004, the California Supreme Court granted the plaintiffs' Petition for Review. Wells v. One2One Learning Foundation, 92 P.3d 310 (Cal. 2004).

Valedictorians: Saying "Farewell" to an Honorary Position?

Quarterly Report January-March: 2004 reported on the increasing concerns over the sometimes unhealthy competition for class valedictorian; the content of the speeches at the graduation ceremonies, especially religious content; and the problems attendant to class rankings, especially in schools where student achievement is well above the norm. More schools are considering the elimination of the scholastic honor and the class rankings because of the attendant problems. Controversies continue nevertheless.

1. Abby Moler graduated in 2001 from Stevenson High School in Sterling Heights, Michigan. She was the valedictorian of her class and was among a group of students who were asked to offer their thoughts for the yearbook. Moler chose a Biblical verse from *Jeremiah* 29:11 ("For I know the plans I have for you," declares the Lord, "plans to prosper you and not to harm you, plans to give you hope and a future"). School officials from the Utica Community Schools told her the quote would have to be deleted from the yearbook due to its religious nature. Moler sued the school district under the First Amendment. The school district settled the lawsuit in May of 2004. The settlement required the school district to place a sticker with Moler's original entry in copies of the yearbook on file at the high school; order current yearbook staff not to censor other religious or political speech; train staff on free speech and religious freedom issues; and write Moler a letter of apology. Moler did not seek money damages as a part of her suit. "I'm thrilled," she stated. She is presently attending college and would like to become a teacher. "We got everything we asked for. I received a wonderful education from Utica schools and now, that I'm entering the teaching profession, I wanted to do my part in maintaining the excellence in education."[40]

2. Ian Blackwood was selected Salutatorian of the 2004 class at Gavit High School in the School City of Hammond (Indiana). As Salutatorian, Blackwood was entitled to address his classmates at their graduation ceremony in June of 2004. The high school principal wanted the speeches to be "upbeat and invoke happiness." The Valedictorian was to speak about the future while the Salutatorian was to reflect on the past years at school. Blackwood's speech, however, was critical of the war in Iraq. Although well written, the principal informed him that if he did not rewrite the speech, he would not be permitted to speak. "No censorship is involved," the principal maintained. "You have a lot of people you are representing up there. You have to choose your words carefully." Blackwood said he was not told there was a "theme" until after he had turned in his speech. "I wanted people to stop and think," he said. "The purpose of the speech was not to offend anyone. Although Blackwood did not share the speech with any other school personnel, the teachers were aware of its content. One teacher reprimanded him for the speech's content. Nevertheless,

[40]"Student Settles Yearbook Bible Verse Case," *Associated Press Dispatch*, published at CNN.com (May 12, 2004).

Blackwood refused to rewrite his speech.[41] School officials, after receiving public criticism, lifted the ban on Blackwood's address. Blackwood, however, said he did not want the controversy to overshadow the graduation ceremony and declined to deliver the speech.[42]

Court Jesters: *The Cat With The Chat*

In **Quarterly Report** April-June: 2002, the case of "Blackie, the Talking Cat" was reported in Miles v. City Council of Augusta, Ga., 551 F.Supp. 349 (S.D. G. 1982). Blackie had been taught by his otherwise unemployed owners to talk. When a passerby on the streets of Augusta would ask for Blackie to talk, the cat would do so. Thereafter, Blackie's owners would ask for a contribution. The local constabulary was not amused and warned Blackie's owners that they would have to obtain a business license. They declined, resulting in the instant suit. The federal district court judge ran into Blackie on the street (not literally). The owner demonstrated Blackie's linguistic abilities. The cat told the judge, "I love you" and "I want my Mama." This demonstration was the cat's meow to the judge, but the law is the law and he ruled against Blackie and his owners.

But cats have nine lives and so do lawsuits involving the felines. Blackie *et al.* appealed the adverse decision of the federal district court. However, the 11th Circuit Court of Appeals was not sympathetic to their plight. In Miles v. City Council of Augusta, Ga., 710 F.2d 1542 (11th Cir. 1983), a three-member panel affirmed the district court in a *per curiam* opinion but could not resist adding more detail to the already fascinating story of Blackie the Talking Cat. Carl Miles obtained Blackie at a rooming house in South Carolina. "[A] girl come around with a box of kittens, and she asked us did we want one," he related. "I said no, that we did not want one. As I was walking away from the box of kittens, a voice spoke to me and said, 'Take the black kitten.' I took the black kitten, knowing nothing else unusual or nothing else strange about the black kitten." Id. at 1543.

There is no evidence the voice Carl heard was either (1) in his head or (2) spoken by Blackie. When Carl later realized that Blackie was trying to talk to him, he believed the voice he heard that day "was the voice of God." Id.

The court made much of this *deus ex machina*, resorting to numerous theological references and puns that employ the prefix "cat." Mr. Miles set out to fulfill his divination by developing a rigorous course of speech therapy," the court wrote, adding that "Blackie's catechism soon began to pay off" as Blackie began to speak. "Blackie's talents were taken to the marketplace, and the rest is history. Blackie catapulted into public prominence.... The public's affection for Blackie was the catalyst for his success, and Blackie loved his fans.... Sadly, Blackie's cataclysmic rise to fame crested and began to subside." Blackie and the Miles moved to Augusta, where they sought "contributions"

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[41]"School Fighting Mad Over Speech," *Northwest Indiana Times* (Olivia Clarke, June 4, 2004); "Class Salutatorian Told to Rewrite Anti-War Speech," *Associated Press Dispatch* (June 4, 2004).

[42]"Senior Declines to Deliver Controversial Graduation Speech," *Associated Press Dispatch* (June 9, 2004).

from passersby who wished to hear Blackie speak. Certain "ailurophobes" (including the police, "obviously no ailurophiles themselves") insisted that Miles obtain a business license, to which they vehemently disagreed, asserting (in part) that Blackie had a First Amendment free-speech right.

The Augusta ordinance requiring a business license contains "no category for speaking animals," the Miles asserted. But the Augusta ordinance had a "catch-all" clause that would cover any "Agent or Agency not specifically mentioned" in the list of other enterprises requiring such a business license. Id. at 1544. "Although the Miles' family called what they received for Blackie's performances 'contributions,' these elocutionary endeavors were entirely intended for pecuniary enrichment and were indubitably commercial." In fact, the court noted, "Blackie would become catatonic and refuse to speak whenever his audience neglected to make a contribution." Id.

The court was also dismissive of the First Amendment claims. "This court will not hear a claim that Blackie's right to free speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a 'person' and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a right, we see no need for appellants to assert his right *jus tertii*. Blackie can clearly speak for himself." Id. at *n.* 5.

Apparently, the cat got the Miles' collective tongue. They did not pursue the matter further.

Date: _____

_____
Kevin C. McDowell, General Counsel
Indiana Department of Education

The **Quarterly Report** and other publications of the Legal Section of the Indiana Department of Education can be found on-line at <www.doe.state.in.us/legal/>.

Policy Notification Statement

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